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No. 88-192 and No. 88-325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MCKESSON CORPORATION,
Petitioner,
v.
DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION, and OFFICE OF THE COMPTROLER, STATE OF FLORIDA,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Florida

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AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioner,
v.
MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Arkansas

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS AND BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Committee on State Taxation of the Council of State Chambers of Commerce hereby respectfully moves for leave to file the attached brief *amicus curiae* in support of the petitioners in the above-captioned cases. Written consents of the petitioners and of the respond-

ent in Case No. 88-192 have been obtained. The consent of the respondents in Case No. 88-325 was requested but refused.

The Council of State Chambers of Commerce (COUNCIL), organized in 1932, consists of 40 Chambers of Commerce. The Committee on State Taxation (COST), one of the three advisory committees of the COUNCIL, consists of 291 corporate members which conduct a substantial portion of the interstate commerce of United States taxpayers. One of COST's principal activities has been to work with the States and others toward developing fair and equitable standards of state taxation. Member companies of COST are representative of that part of the Nation's business sector which is most directly affected by state taxation of interstate operations. COST is, therefore, vitally interested in cases such as the instant cases in which the States of Arkansas and Florida have given "prospective only" effect to judicial decisions holding discriminatory state taxation schemes unconstitutional, thereby denying taxpayers relief from the states' levy of unconstitutional taxes.

In *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, No. 88-192, the Florida Supreme Court held that although Florida's tax preferred treatment for alcoholic beverages made from Florida's crops was invalid under *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263 (1984), the holding is "prospective" because of Florida's alleged "good faith reliance on a presumptively valid statute". The challenged alcoholic beverage excise tax scheme providing tax preferences for alcoholic beverages manufactured from certain crops, *all of which grow in Florida*, was adopted as an attempt to circumvent this Court's decision in *Bacchus*. Before this statutory amendment, tax preferred treatment was granted explicitly to alcoholic beverages manufactured and bottled in Florida from Florida products.

In *American Trucking Ass'ns, Inc. v. Smith*, No. 88-325, the Arkansas Supreme Court not only denied application to open years of this Court's decision on June 23, 1987 in *American Trucking Ass'ns, Inc. v. Scheiner*, 107 S. Ct. 2829 (1987), invalidating Pennsylvania's highway flat taxes as unconstitutionally discriminatory under the Commerce Clause, but applied *Scheiner* prospectively from August 14, 1987, the date Justice Blackmun ordered the contested taxes be placed in escrow. 108 S. Ct. 2 (1987). Other States have sought to apply the prospectivity doctrine to avoid refunds of similar flat taxes found unconstitutional under this Court's *Scheiner* decision, including Maryland, Pennsylvania, New Jersey and Vermont. In a particularly disturbing action, the Maryland Circuit Court attempted to delay implementation of *Scheiner* until July 1, *1988*. *American Trucking Ass'ns, Inc. v. Goldstein*, No. 87182090/CE67934 (Md. Cir. Ct. Oct. 23, 1987), *rev'd*, 541 A.2d 955 (Md. 1988). The split of authority and the importance of this "prospective only" problem was highlighted by the New Jersey Tax Court in its opinion issued on September 8, 1988 in *American Trucking Ass'ns, Inc. v. Kline*, No. 07-14-1667-85MVT, ordering refunds of unconstitutional truck decal taxes so that "legislators will be dissuaded from enacting legislation which discriminates against interstate commerce."

A similar "prospective only" issue is presented by the appellant before this Court in *Ashland Oil, Inc. v. Rose*, 350 S.E. 2d 531 (W. Va.), *appeal docketed*, No. 88-421, in which West Virginia is attempting to give prospective effect only, except as to Armco, to this Court's decision in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), invalidating the state's wholesale gross receipts tax as unconstitutionally discriminatory under the Commerce Clause. The West Virginia Supreme Court held that the State can retain all unconstitutional taxes assessed and collected prior to June 12, 1984 and continue to assess and collect unconstitutional taxes for tax periods prior to June 12, 1984.

Until recently, States and taxpayers recognized a taxpayer's right to a refund or abatement of unconstitutionally-exacted taxes. There is a disturbing, emerging trend by some States to apply a judicial decision of unconstitutional or illegal state taxation on a "prospective only" basis, thereby allowing them to retain the financial benefit of the revenues collected under the unconstitutional law. *See also National Can Corp. v. Washington Dep't of Revenue*, 749 P.2d 1286 (Wash.), *appeal dismissed, cert. denied*, 108 S. Ct. 2030 (1988) (6-3 vote on June 6, 1988); *Penn Mutual Life Ins. v. Department of Licensing & Regulation of the State of Michigan*, 412 N.W. 2d 668 (Mich. App. 1987); *OAMCO v. Lindley*, 493 N.E. 2d 1345 (Ohio 1986), *aff'd on reh'g*, 500 N.E. 2d 1379 (Ohio 1987), *clarified, substituted op., in part*, 503 N.E. 2d 1388 (Ohio 1987); *First of McAlester Corp. v. Oklahoma Tax Comm'n*, 709 P.2d 1026 (Okla. 1985); and *Metropolitan Life Ins. Co. v. Commissioner*, 373 N.W. 2d 399 (N.D. 1985).

In its holding of "pure prospective application" from June 23, 1987, the date of this Court's decision in *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 107 S. Ct. 2810 (1987), the Washington Supreme Court determined that "for purposes of applying the refund statutes it is as if the taxes collected pre-*Tyler* were constitutionally collected." *National Can Corp. v. Washington Dep't of Revenue*, 749 P.2d at 1287. However, it has long been established that "[t]he retention by the state of an unconstitutional tax is as much a violation of the Constitution as was the collection of tax in the first instance. *See, Carpenter v. Shaw*, 280 U.S. 363, 369, 50 S. Ct. 121, 123, 74 L.Ed. 478 (1930)." *United States v. State Tax Comm'n of Mississippi*, 645 F.2d 4, 5 (5th Cir.), *cert. denied*, 454 U.S. 896 (1981).

The purpose of the prospectivity holdings adopted by the courts below is to deny the taxpayers the remedy to which they are constitutionally entitled. The wave of similar, recent unconstitutional "prospective only" holdings is affecting our member companies in many parts of this Nation. If permitted to stand, findings of unconstitutional state taxation by this Court will become meaningless in these jurisdictions.

By this motion, COST seeks leave to show that judicial decisions of unconstitutional state taxation should apply to all taxpayers for all open years, to prevent inequity and protect the constitutional rights of interstate taxpayers.

COST therefore urges that leave be granted to file a brief as *amicus curiae* and respectfully so moves the Court.

Respectfully submitted,

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Dated: January 6, 1989

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BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Taxation of the Council of State Chambers of Commerce as

amicus curiae in support of Petitioners in the above-captioned cases.

INTEREST OF *AMICUS CURIAE*

The interest of the Committee on State Taxation of the Council of State Chambers of Commerce is set forth in the accompanying Motion for Leave to File Brief *Amicus Curiae*.

SUMMARY OF ARGUMENT

An increasing number of States have given "prospective only" effect to decisions of unconstitutional state taxation in order to avoid refunds and to allow continued collection of such taxes after they have been invalidated. State courts have applied their own standards to justify their prospective rulings. While *amicus* believes the three-pronged test established by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), as governing consideration of whether to impose a decision prospectively only, should be abandoned in favor of the standards set forth in *Griffith v. Kentucky*, 107 S. Ct. 708 (1987), even the inadequate standards of *Chevron* have not been followed. A balancing of equities in determining the taxpayers' remedy for the imposition of an unconstitutional tax has been ignored. Taxpayers' rights to recover unconstitutionally-exacted taxes have been extinguished and States are retaining the revenues collected under unconstitutional laws.

Just as in the area of criminal litigation, application of the prospectivity standards of *Chevron* in the civil tax area has generated incompatible rules and inconsistent principles. This Court should adopt the *Griffith* rule and thereby apply decisions of unconstitutional or illegal state taxation to similarly-situated taxpayers for all open years. In the event the rule of *Griffith* is not extended to non-final civil tax cases, clarification by this Court is

needed as to the scope of the prospectivity doctrine and the appropriate standards governing determinations of non-retroactive application of judicial decisions invalidating state taxes as unconstitutional under the United States Constitution.

Guidance by this Court is needed to assure a consistent and fair system of taxation throughout the nation which will (1) allow each State to receive its just share of the total tax contribution of the nation's business sector, (2) prevent inequity and (3) protect the constitutional rights of interstate taxpayers.

ARGUMENT

DECISIONS OF UNCONSTITUTIONAL OR ILLEGAL STATE TAXATION SHOULD APPLY EQUALLY TO SIMILARLY-SITUATED TAXPAYERS FOR ALL OPEN YEARS

The rule of limited retrospectivity—that a change in law must, at a minimum, be given effect while a case is pending on direct review was established in *United States v. The Schooner Peggy*, 1 Cranch 103 (1801). While this principle was applied in *Schooner Peggy* where the intervening change in law involved a treaty, this same approach has been applied in cases where a change in law is made by statute, *Bradley v. School Board*, 416 U.S. 602 (1960); *United States v. Alabama*, 362 U.S. 602 (1960) (per curiam); *Ziffrin, Inc. v. United States*, 318 U.S. 73 (1943); *Carpenter v. Wabash Ry.*, 309 U.S. 23 (1940); by constitutional amendment, *United States v. Chambers*, 291 U.S. 217 (1934); by judicial decision, *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981); *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941); *Moores v. National Bank*, 104 U.S. 625 (1882); and where the change in law is "constitutional, statutory or judicial", *Thorpe v. Housing Authority*, 393 U.S. 268, 282 (1969).

The rule of *Schooner Peggy* was noted as being applicable in both civil and criminal litigation in *Linkletter v. Walker*, 381 U.S. 618 (1965) when this Court adopted the first of its modern retroactivity tests for cases involving application of new constitutional rules. The three-pronged test established therein applied to criminal litigation and required a "weigh[ing] of the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." 381 U.S. at 629.

A separate standard for governing questions of retroactive application of new rules of law in civil cases was enunciated in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Three factors were established as relevant in determining whether a decision should have nonretrospective effect:

> "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which the litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . . Second, we must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard this operation . . . . Finally, we have weighed the inequity imposed by retroactive application for where a decision of this court would produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice of hardship by a holding of nonretroactivity." [Citations deleted.] 404 U.S. at 106-107.

Application of the retrospective standards of *Linkletter* generated incompatible rules and inconsistent principles and thus in *Griffith v. Kentucky*, 107 S. Ct. 708 (1987), this Court adopted Justice Harlan's approach to retro-

activity propounded in *Desist v. United States*, 394 U.S. 244, 256 (1969) (dissenting opinion), and in *Mackey v. United States*, 401 U.S. 667, 675 (1971). The Court held in *Griffith* that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final with no exception for cases in which the new rule constitutes a 'clear break' with the past." 107 S. Ct. at 716. Thus, the Court has abandoned its efforts, at least in the area of criminal litigation, to deviate from the established principle under the *Schooner Peggy* line of cases that new rules of law should be applied retroactively to non-final cases.

While it was noted in *Griffith* that the area of civil retroactivity "continues to be governed by the standard announced in *Chevron Oil Co. v. Huson*", 107 S. Ct. at 713 n.8, the rationale for eliminating deviating retrospective rules applies equally here. This Court rejected any exception for a new rule which is a clear break with the past for the same reasons that failure to apply a newly-declared rule to non-final cases violates basic norms of constitutional ajudication:

> "First, it is a settled principle that this Court adjudicates only 'cases' and 'controversies'. *See* U.S. Const. Art. III, § 2. Unlike a legislature, we do not promulgate new rules of constitutional criminal procedures on a broad basis. Rather, the nature of judicial review requires that we adjudicate specific cases, and each case usually becomes the vehicle for announcement of a new rule. But after we have decided a new rule in the case selected, *the integrity of the judicial review requires that we apply the rule to all similar cases pending on direct review.*"
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> "*[W]e fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final.* Thus, it is the nature of judicial review that precludes us from '[s]imply

fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule.' "

"Second, *selective application of new rules violates the principle of treating similarly situated defendants the same.* As we pointed out in *United States v. Johnson*, the problem with not applying new rules to cases pending on direct review is 'the *actual inequity* that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary' of a new rule. Although the Court had tolerated this inequity for a time by not applying new rules retroactively to cases on direct review, we noted: 'The time for toleration has come to an end.' " [Citations deleted; emphasis supplied.] 107 S. Ct. at 713-714.

Indeed, Justice Harlan cautioned the Court in *United States v. Estate of Donnelly*, 397 U.S. 286, 295 (1970) (Harlan, J., concurring), that certain distinctions suggested in civil cases, such as between clear and ambiguous statutes, decisions construing statutes for the first time, decisions overruling prior constructions of statutes, may lead the Court to a "retroactivity quagmire" similar to that which it has just escaped in the criminal field. 397 U.S. at 295. In Justice Harlan's view, new rules of law should be applied retrospectively also in non-final civil cases, there being no justification for applying principles, constitutional or otherwise, determined to be wrong to litigants who are or may still come to court. Consistent with his approach to criminal retroactivity adopted by this Court in *Griffith*, "the underlying substantive principle [is] that short of a bar of *res judicata* or statute of limitations, courts should apply the prevailing decisional rule to the cases before them." 397 U.S. at 297. It is again that time called for by Justice Harlan when " 'Retroactivity' must be rethought." 107 S. Ct. at 712.

The question of the retroactive effect of judicial decisions of unconstitutional state taxation, such as that presented in the instant cases, is a significant and recurring issue, affecting hundreds of interstate taxpayers. *See National Can Corp. v. Washington Dep't of Revenue*, 749 P.2d 1286 (Wash.), *appeal dismissed, cert. denied*, 108 S. Ct. 2030 (1988); *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 107 S. Ct. 2810, 2822-2823 (1987); *American Trucking Ass'ns, Inc. v. Scheiner*, 107 S. Ct. 2829, 2847-2848 (1987); *Ashland Oil, Inc. v. Rose*, 350 S.E. 2d 531 (W. Va. 1986), *appeal dismissed for want of final judgment*, 107 S. Ct. 1949 (1987); *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), *reh'g denied*, 469 U.S. 912 (1984); *Salorio v. Glaser*, 461 A.2d 1100 (N.J.), *cert. denied*, 464 U.S. 993 (1983). A similar retroactivity issue is presented by the appellant in *Ashland Oil, Inc. v. Rose*, 350 S.E. 2d 531 (W. Va. 1986), *appeal docketed*, No. 88-421.

It is clear that an increasing number of States are relying on the prospectivity doctrine to avoid refunds of unconstitutional or illegal taxes. It is equally clear that the states' use of the prospective doctrine to extinguish a taxpayer's right to a refund of unconstitutional state taxes has produced myriad problems. *See also Penn Mutual Life Ins. Co. v. Department of Licensing & Regulation of the State of Michigan*, 412 N.W. 2d 668 (Mich. App. 1987); *OAMCO v. Lindley*, 493 N.E. 2d 1345 (Ohio 1986), *aff'd on reh'g*, 500 N.E. 2d 1379 (Ohio 1987), *clarified, substituted op., in part*, 503 N.E. 2d 1388 (Ohio 1987); *First of McAlester Corp. v. Oklahoma Tax Comm'n*, 709 P.2d 1026 (Okla. 1985); *Metropolitan Life Ins. Co. v. Commissioner*, 373 N.W. 2d 399 (N.D. 1985). *But see Burlington Northern R.R. Co. v. Board of Supervisors*, 418 NW. 2d 72 (Iowa 1988) (prospective effect not given federal circuit court holding that Iowa's statutory scheme for taxing personal property of a railroad

contravened a federal statute); *American Trucking Ass'ns, Inc. v. Conway*, No. S-14786WnC (Vt. Super. Ct. Feb. 11, 1988), *appeal docketed*, No. 88-156 (Vt. Sup. Ct.) (holding of unconstitutional truck decal taxes under *Scheiner* not applied prospectively since the issue had been resolved in state court in 1983 and thus the taxpayers are entitled to the refund of escrowed tax payments); *American Trucking Ass'ns, Inc. v. Kline*, No. 07-14-1667-85MVT (N.J. Tax Ct. Sept. 8, 1988) (taxpayers entitled to refunds of truck decal taxes since no justification existed for enactment in 1984 of obviously discriminatory taxes).

A purely "prospective only" ruling applies to all taxpayers, including the successful litigants, regardless of whether refund claims and assessments are pending or on appeal before any administrative body or court. However, state courts have also applied decisions of unconstitutional or illegal taxation retroactively to only the successful taxpayer litigants, *see Ashland Oil, Inc. v. Rose, supra; OAMCO v. Lindley, supra;* to only those taxpayers who are parties to pending litigation, *see Osterndorf v. Turner*, 426 So.2d 539 (Fla. 1982); or to only those taxpayers who have actions pending before any administrative body or court in the State, *see Kansas City Millwright Co., Inc. v. Kalb*, 564 P.2d 1281 (Kan. 1977); and applied the decision prospectively as to all other taxpayers.

State courts have generally applied their prospective holdings of unconstitutional state taxation effective from the date of judgment even though the taxes were invalidated under a prior decision of this Court. *But see First of McAlester Corp. v. Oklahoma Tax Comm'n, supra* (decision invalidating state bank tax as unconstitutional under *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392 (1983) effective from January 24, 1983, the date of this Court's decision). Thus, the State can retain all unconstitutional taxes assessed or collected prior to this

Court's decision and continue to assess and collect the unconstitutional taxes subsequent to this Court's decision until issuance of its own prospective decision. In effect, the State is not only applying the Court's decision prospectively but postponing prospectivity until a later date. State courts have even permitted continued collection of the invalid and unconstitutional tax for a period of time after the prospective decision where the decision is to become effective at some future date. *See Salorio v. Glaser, supra* (prospective effective date of holding Emergency Transportation Taxes unconstitutional delayed to allow the taxing authorities to collect the tax until January 1, 1984, almost six months later). *But see American Trucking Ass'ns, Inc. v. Goldstein*, 541 A.2d 955 (Md. 1988) (trial court erred in postponing effective date of its holding that Maryland decal fee was unconstitutional under *Scheiner* to July 1, 1988 to allow state collection through current fiscal year).

This Court's decisions of unconstitutional state taxation in *Tyler Pipe* and *Armco* have been given immediate prospective effect by the respective courts below, *National Can Corp. v. Washington Dep't of Revenue, supra; Ashland Oil, Inc. v. Rose, supra;* however, an issue raised by the appeal in *Ashland* is whether the taxpayer is even seeking retroactive application of the *Armco* decision. Questions as to what is the operative event in determining whether a prospective or retroactive remedy for unconstitutional state taxation is being sought have also arisen recently in other cases where the state tax administrator has sought retention or collection of the unconstitutional taxes after this Court's decision. *See Midland Bank & Trust Co. v. Olsen*, 717 S.W. 2d 580 (Tenn. 1986) (refunds of taxpayers' 1982 corporate excise taxes mandated by *Memphis Bank* did not involve retroactive application of that decision since the taxpayers' cause of action did not accrue until the 1982 taxes were due and paid under protest which occurred after the decision was

rendered); *American Trucking Ass'ns, Inc. v. Goldstein, supra* (retrospectivity not at issue since the tax obligation did not occur until approximately January 1, 1988, more than six months after the date of this Court's *Scheiner* decision).

The three-pronged test established by this Court in *Chevron* governs determinations in civil cases of whether a decision should be applied prospectively. *See Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 107 S. Ct. at 2822-2823 (1987); *Griffith v. Kentucky*, 107 S. Ct. at 713 n.8 (1987). *See also American Trucking Ass'ns, Inc. v. Smith*, 746 S.W. 2d 377 (Ark. 1988), *cert. granted*, —— U.S. ——, No. 88-325; *National Can Corp. v. Washington Dep't of Revenue, supra; First of McAlester Corp. v. Oklahoma Tax Comm'n, supra.* Nevertheless, many state courts have applied their own criteria for prospective application of a decision holding a state tax unconstitutional, *see Ashland Oil, Inc. v. Rose, supra* (West Virginia Supreme Court applied state standards in ruling this Court's *Armco* decision should be given prospective effect only), and typically rest their prospective holdings on "equitable considerations" of the state's reliance on the overturned taxing statute for revenue and the great financial hardship on the State if retroactive effect were allowed, *see Penn Mutual Life Ins. Co. v. Department of Licensing and Regulation, supra; Metropolitan Life Ins. Co. v. Commissioner, supra; Salorio v. Glaser, supra*; or that the taxpayers, if given a refund, would "in all probability receive a windfall, since the cost of the tax has likely been passed on to their customers." *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 524 So.2d 1000, 1010 (Fla. 1988), *cert. granted*, —— U.S. ——, No. 88-192. *See also Metropolitan Life Ins. Co. v. Commissioner, supra* (pass-on defense insufficient alone to deny a refund of unconstitutional taxes but may be considered in weighing the equities in a prospectivity determination). However, many

state courts find the pass-on argument lacking in merit. *See American Trucking Ass'ns, Inc. v. Conway, supra* ("Equity supports giving that windfall, if it exists, to the wronged plaintiffs."); *American Trucking Ass'ns, Inc. v. Kline, supra* ("I cannot conclude that plaintiffs will receive a windfall if a refund is granted. As between the State, which enacted a tax which was unconstitutional, and the taxpayers who were forced to pay this tax, the latter have the superior equitable claim.")

Furthermore, the three-pronged *Chevron* test has been given varying interpretations by the States as to the proper weight to be given each factor and as to the correct analysis required in applying the test to determine whether a decision of unconstitutional state taxation has declared a "new principle of law". The first *Chevron* factor requires that if a decision is to be applied prospectively only, it must have established a new principle of law by either overruling clear past precedent on which litigants may have relied or deciding an issue of first impression whose resolution was not clearly foreshadowed. This Court has stated that in civil cases this "'clear break' principle has usually been . . . the threshold test for determining whether or not a decision should be applied nonretroactively." *United States v. Johnson*, 457 U.S. 537, 550 n.12 (1982). Some States have applied the "clear break" principle as the threshold requirement in their prospectivity determinations, *see National Can Corp. v. Washington Dep't of Revenue, supra; First of McAlester Corp. v. Oklahoma Tax Comm'n, supra;* while others have given equal weight to all three *Chevron* factors, *see American Trucking Ass'ns, Inc. v. Smith, supra.*

State courts have also applied varying standards in determining whether a decision has established a "new principle of law" under the first *Chevron* criterion. In its ruling that this Court's decision in *Scheiner* should apply prospectively only, the Arkansas Supreme Court

found this aspect of the *Chevron* test was satisfied because *Scheiner* "declared invalid a tax which a reasonable person could easily have found to pass Commerce Clause muster upon examination of *Aero Mayflower Transit Co. v. Bd. of R.R. Comm'rs of Montana*, 332 U.S. 495 (1947), and *Aero Mayflower Transit Co. v. Georgia Public Serv. Comm'n*, 295 U.S. 285 (1935), in which 'flat' highway taxes were held not violative of the Commerce Clause." *American Trucking Ass'ns, Inc. v. Smith*, 746 S.W. 2d at 378-379. *Cf. McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 524 So.2d at 1010 (prospective application of holding of unconstitutional tax preference scheme under this Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), justified because tax was collected by division in good faith reliance on presumptively valid statute). *But see American Trucking Ass'ns, Inc. v. Kline, supra* (holding of unconstitutional truck decal taxes under *Scheiner* not applied prospectively since this decision was clearly foreshadowed by this Court's decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)).

The Washington Supreme Court finding in *National Can* that this Court's *Tyler Pipe* decision established a new principle of law overruling past precedent on which litigants may have relied was based on "[the Washington Supreme Court's] unanimous decision in *National Can* and *Tyler Pipe*, the long line of [Washington Supreme Court] cases upholding the Washington B & O tax, the fact that *Tyler* overruled past precedent on which the states may have relied, and Justice Scalia's dissent in *Tyler*", *National Can Corp. v. Washington Dep't of Revenue*, 749 P.2d at 1288, even though the holding was "clearly foreshadowed" by the Department of Revenue at least by the time this Court issued its decision in *Armco* on June 12, 1984, *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 107 S. Ct. at ——. *See also First of McAlester Corp. v. Oklahoma Tax Comm'n*, 709

P.2d at 1036 ("Although the new principle of law established in *Memphis Bank* might be characterized as merely a progression from former decisions, it was not foreseen by the Commission, nor by the Oklahoma Legislature."). The West Virginia Supreme Court of Appeals, applying standards similar to those in *Chevron*, relied principally on this Courts' dismissal of the appeal in *Columbia Gas Transmission Corp. v. Rose*, 459 U.S. 807 (1982), involving a similar wholesale gross receipts tax, for its conclusion that this Court's *Armco* decision "represented a reversal of prior precedent". *Ashland Oil, Inc. v. Rose*, 350 S.E. 2d at 536.

A question raised by these cases is whether the standards applied by the state courts satisfy *Chevron*'s "new principle of law" or "clear break" with precedent requirement. It has long been clear that the Commerce Clause prohibits taxes which favor local business over interstate commerce. *See Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977); *Maryland v. Louisiana*, 415 U.S. 725 (1981); *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984); *American Trucking Ass'ns, Inc. v. Scheiner*, 107 S. Ct. 2829 (1987); and *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 107 S. Ct. 2810 (1987). Despite the clarity of this principle, attempts to circumvent it are limited only by the imagination and the energy of state tax collectors. If a judicial decision of unconstitutional state taxation involves large potential refunds for many taxpayers, it is probable that no refunds will be granted. State courts have applied varied prospectivity standards to allow the States to retain the revenues collected under an unconstitutional tax.

In *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, there was clearly neither a "new principle of law" nor a "clear break" with precedent. There was nothing more than a transparent attempt to circumvent

the Court's decision in *Bacchus*. In *American Trucking Ass'ns, Inc. v. Smith*, there was also neither a "new principle of law" nor a "clear break". Both cases represent the worst side of government—flagrant attempts to collect and retain taxes which the government knows are unconstitutional. Some States even assert penalties for failure to pay unconstitutional taxes. What could be more outrageous?

The rationale of this Court in *Griffith* for abandoning the prospectivity doctrine in non-final criminal cases is as compelling in civil tax cases. Just as in criminal cases where substantial conceptual difficulties arose by not applying new rules retroactively, application of the prospectivity standards of *Chevron* has generated incompatible, unworkable rules and inconsistent principles which are often ignored at lower levels. In cautioning against this "retroactivity quagmire", similar to which the Court has just escaped in the criminal field, Justice Harlan also reasoned:

> "The impulse to make a new decisional rule nonretroactive rests, in civil cases at least, upon the same considerations that lie at the core of *stare decisis*, namely to avoid jolting the expectations of parties to a transaction. Yet once the decision to abandon precedent is made, I see no justification for applying principles determined to be wrong, be they constitutional or otherwise, to litigants who are in or may still come to court. The critical factor in determining when a new decisional rule should be applied to a transaction consummated prior to the decision's announcement is, in my view, the point at which the transaction has acquired such a degree of finality that the rights of the parties should be considered frozen. Just as in the criminal field the crucial moment is, for most cases, the time when a conviction has become final, see my *Desist* dissent, *supra*, so in the civil area that moment should be when the transaction is beyond challenge either because the statute of limitations has run or the rights of the parties have been fixed by litigation and have become *res judicata*. Any uncertainty engendered by this approach should, I think, be deemed part of the risks of life." *United States v. Estate of Donnelly*, 397 U.S. at 295-296 (Harlan, J., concurring).

Adoption of Justice Harlan's view of uniform retroactive application of new decisional rules in civil cases unless a transaction is beyond challenge because of a bar of *res judicata* or statute of limitations would avoid this retroactivity quagmire and comport with basic norms of constitutional adjudication and the principle of treating similarly situated taxpayers similarly, the same considerations underlying this Court's decision in *Griffith*.

In the event this Court declines to adopt Justice Harlan's approach as to the retroactive application of judicial decisions of unconstitutional state taxation, guidance by this Court is needed as to the scope of the prospectivity doctrine and the appropriate standards governing determinations of non-retroactivity. State courts have applied their own criteria for their prospective decisions. The *Chevron* test has proven to be unworkable, resulting in varying interpretations by the States. Different standards have been applied in determining whether a decision of unconstitutional state taxation has established a "new principle of law" under the first *Chevron* criterion, producing contrary conclusions between States with respect to the very same decision of unconstitutionality issued by this Court. States are also divided as to whether application of decisions invalidating discriminatory state taxes further or retard operation of the Commerce Clause. Equitable considerations are frequently biased in favor of the State which enacted the unconstitutional tax, thereby permitting the State to retain and continue to collect revenues under the unconstitutional law. Taxpayers' rights to illegally-collected taxes under this Court's recent decisions of unconstitutionally discriminatory state taxation are dictated, not by meaningful and dependable

standards for determining retrospective application of the enunciated constitutional rules, but by the individual state court's proclivities. This Court, if it determines that the prospectivity doctrine continues to apply in the area of civil tax litigation, should make it clear that non-retroactivity of decisions of unconstitutional state taxation is governed by the *Chevron* test and provide a meaningful interpretation of the *Chevron* standards. The better result would be the replacement of the *Chevron* standards with the *Griffith* standards.

CONCLUSION

For the foregoing reasons, this Court should (1) reverse the decisions below, (2) order the respective agencies to pay the disputed tax refunds, and (3) rule that the *Griffith* standards are being extended to civil tax cases.

Respectfully submitted,

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